

Hon. Edward F. Shea

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

SARAH BRADBURN, PEARL)
CHERRINGTON, CHARLES)
HEINLEN, and THE SECOND) NO. CV-06-327-EFS
AMENDMENT FOUNDATION,)
Plaintiffs,) DEFENDANT NCRL'S
v.) MEMORANDUM REGARDING
NORTH CENTRAL REGIONAL) RESPONSE TO CERTIFIED
LIBRARY DISTRICT,) QUESTION
Defendant.)

The analysis of the Washington Supreme Court in *Bradburn, et al. v. North Central Reg. Lib. Dist.*, 168 Wn.2d 789, 231 P.3d 166 (2010)

DEFENDANT NCRL'S MEMORANDUM
REGARDING RESPONSE TO CERTIFIED
QUESTION - 1

CV-06-327-EFS
#758984 v1 / 42703-001

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1 (“*Bradburn*”) answers all legal issues held in abeyance by this Court’s
 2 September 30, 2008 order. (Dkt. 96). Neither Defendant North Central
 3 Regional Library District (“NCRL”) nor Plaintiffs¹ contend that genuine issues
 4 of material fact remain unresolved. Accordingly, this Court should decide the
 5 pending cross-motions for summary judgment at this time based on *Bradburn*
 6 and the parties’ previous submissions.

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 10 **I. *Bradburn* resolves Plaintiffs’ Article I, Section 5 claim.**

11 On May 6, 2010, the Washington State Supreme Court answered this
 12 Court’s certified question, holding that:

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 14 a library can, subject to the limitations set forth in this opinion,
 15 filter Internet access for all patrons, including adults, without
 16 violating article I, section 5 of the Washington State Constitution.

17 *Bradburn*, 168 Wn.2d at 793.

18 The *Bradburn* court stated that it would conclude NCRL’s filtering policy
 19 does not violate article I, section 5, on the record presented but recognized this
 20 Court must apply the decision to the case. *See Bradburn*, 168 Wn.2d at 818.
 21 Because *Bradburn* unequivocally held that NCRL’s filtering policy was
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 26 ¹ See, e.g., Plaintiffs’ Opposition to NCRL’s Motion for Summary Judgment (Dkt. 53,
 27 pg. 1, Ins. 2-3): “The facts crucial to resolving this case are not in dispute.....”

consistent with article I, section 5 of the Washington State Constitution, summary judgment should be entered for NCRL on this claim.²

II. Plaintiff's First Amendment claim is foreclosed by ALA as explained in Bradburn

Although *Bradburn* literally deals with Plaintiffs' state constitutional claim, the court drew heavily upon First Amendment law in evaluating Plaintiffs' challenges to NCRL's filtering policy. Thus, the *Bradburn* Court's analysis is highly instructive in resolving Plaintiffs' federal claim.

The First Amendment claim is based on two contentions: first, that NCRL's filtering policy is overbroad;³ and second, that NCRL's filtering policy is a constitutionally impermissible content-based restriction on speech. Both arguments fail in light of *United States v. American Library Ass'n*, 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003) ("ALA") and other federal precedent as explained in *Bradburn*.

² In dealing with questions of state law, federal courts are bound by the decisions of the state's highest court. See *LaFrance Corp. v. Werttemberger*, 2008 LEXIS 98741 at *4 (W.D. Wash. 2008) citing *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1154 (9th Cir. 2003).

³ Plaintiffs claim overbreadth in "categorizations that fail to track constitutional requirements, filtering errors, and NCRL's policy of blocking entire web sites when a single page is deemed harmful to minors." *Bradburn*, 168 Wn.2d at 804.

1 A. NCRL's filtering policy is not overbroad.

2 In evaluating Plaintiffs' overbreadth arguments for, the *Bradburn* court
3 followed First Amendment methodology:
4

5 Accordingly, in deciding whether the filtering policy suffers from
6 overbreadth under article I, section 5, our analytical approach aligns
7 with the approach taken under the First Amendment.

8 *Bradburn*, 168 Wn.2d at 801. In doing so, the *Bradburn* court noted that a
9 majority (not a plurality) of the U.S. Supreme Court reached agreement in *ALA*
10 on several key points, including:
11

12 • "public forum analysis is inappropriate in determining whether a library
13 can constitutionally filter certain Internet content." *Bradburn*, 168 Wn.2d at
14 804;
15

16 • "strict scrutiny does not apply [to a library's collection decisions]." *Id.*
17 at 805; and
18

19 • libraries must exercise discretion when building and maintaining a
20 collection and filtering policies aid in the collection of materials, not the removal
21 of materials after having been selected. *Id.* (*emphasis supplied*).
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23 Based on these and other rulings from *ALA*, the *Bradburn* court concluded
24 that "a library simply does not have to include all constitutionally protected
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28 DEFENDANT NCRL'S MEMORANDUM
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1 materials in its collection” and that a filtering policy that denies access to
2 particular categories of material is not necessarily overbroad. *Bradburn*, 168
3 Wn.2d at 808. Nothing in *ALA* or other federal First Amendment law warrants a
4 different analysis and conclusion than that reached by the *Bradburn* court.
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7 *B. NCRL’s filtering policy is not an impermissible content restriction under*
8 *the First Amendment.*

9 The *Bradburn* court also drew upon federal First Amendment principles in
10 rejecting the contention that NCRL’s filtering policy is an unconstitutional
11 content-based restriction on speech. The *Bradburn* court began its analysis of
12 this issue by rejecting Plaintiffs’ assertion that content-based restrictions are
13 presumptively invalid and subject to strict scrutiny. *Bradburn*, 168 Wn.2d at
14 812 citing *National End. for Arts v. Finley*, 524 U.S. 569, 585, 118 S. Ct. 2168,
15 141 L. Ed. 2d 500 (1998)(“content-based considerations that may be taken into
16 account in the grant-making process are a consequence of the nature of arts
17 funding”) and *Arkansas Educ. Tele. Comm. v. Forbes*, 523 U.S. 666, 672-73,
18 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998). Instead, the *Bradburn* court agreed
19 with *ALA* that Internet access in a public library is not subject to public forum
20 analysis or heightened scrutiny. In light of the historical civic role of the public
21 library, and the discretion a library must have to make judgments about the
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28 DEFENDANT NCRL'S MEMORANDUM
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1 makeup of its collection, the *Bradburn* court held that a filtering policy is
 2 constitutionally-permissible if it is reasonable in light of the library's mission
 3 and policies and is viewpoint neutral. *See Bradburn*, 168 Wn.2d at 811.

5 The *Bradburn* court determined that NCRL's filtering policy met that
 6 standard, noting that:
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- 8 • NCRL's essential mission is to promote reading and lifelong learning.

9 Thus, it is reasonable to restrict Internet access to maintain an environment
 10 conducive to study and contemplative thought;
 11

- 12 • NCRL serves as the *de facto* school library in more than half of its
 13 branches. Unfiltered Internet access is not well-suited to the education of
 14 children and may adversely affect other patrons and library staff as well;
 15

- 16 • NCRL patrons have practical alternatives when content is blocked; and

- 17 • NCRL's filtering policy draws no distinctions based on the speaker's
 18 viewpoint. *Bradburn*, 168 Wn.2d at 816-17.
 19

20 The *Bradburn* court correctly applied *ALA* and other First Amendment
 21 principles in evaluating Plaintiffs' state constitutional claim. The operative facts
 22 surrounding Plaintiffs' First Amendment claim, and the rational basis test
 23 against which the facts are judged, are no different. Plaintiffs may advocate for
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28 DEFENDANT NCRL'S MEMORANDUM
 REGARDING RESPONSE TO CERTIFIED
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1 heightened scrutiny but federal law does not support them. Indeed, in *Ass'n. of*
 2 *Christian Schools v. Stearns*, No. 08-56320, 2010 U.S. App. LEXIS 745, at *3
 3 (9th Cir. Jan. 12, 2010),⁴ the Ninth Circuit recently cited *ALA*, *Finley*, and
 4 *Forbes* (as did the *Bradburn* court) in recognizing that content-based restrictions
 5 on speech are subject only to rational basis scrutiny when the government is
 6 performing a function requiring subjective judgment. The Court wrote:

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 10 The Supreme Court has rejected heightened scrutiny where, as here,
 11 the government provides a public service that, by its nature,
 12 requires evaluations of and distinctions based on the content of
 13 speech.

14 Similarly, a Texas district court recently relied upon *ALA* and *Finley* for
 15 the same principle: when a public service requires the drawing of content-based
 16 distinctions, the decisions that are made are subject to rational basis review.
 17 *Institute for Creation for Research Graduate School v. Texas Higher Educ.*
 18 *Coordinating Bd.*, No. A-09-CA-382-SS, 2010 U.S. Dist. LEXIS 60699, at *46-
 19 47 (W.D. Tex. June 18, 2010).

20
 21 As these decisions demonstrate, *Bradburn's* application of a rational basis
 22 review to NCRL's filtering policy follows from a correct interpretation of *ALA*
 23

24
 25 ⁴ In *Stearns*, the court affirmed a district court's determination that the University of
 26 California's admission policy met First Amendment and Equal Protection standards on its
 27 face and as applied.

1 and First Amendment principles. Plaintiffs nevertheless urge this Court to strike
 2 down NCRL's filtering policy because of their view that *ALA* requires filtering
 3 to stop when an adult patron requests it. *ALA* does not stand for this proposition.
 4 Instead, *ALA* supports libraries' use of filtering in making collection decisions as
 5 long as a mechanism exists for adult patrons to seek the unblocking of
 6 erroneously blocked content consistent with the library's legitimate collection
 7 development policies. 539 U.S. at 214-19. NCRL has precisely such a
 8 mechanism in place. See *Bradburn*, 168 Wn.2d at 798. Nothing in *ALA*
 9 empowers an adult patron to override the reasonable decisions of a library about
 10 the access to internet content. Indeed, in his concurring opinion Justice Breyer
 11 specifically noted that libraries might, by local law or practice, restrict the ability
 12 of patrons to obtain overblocked internet material. 539 U.S. at 219-220.⁵

13 *ALA*, in any event, is less about the nuances of the concurring and
 14 plurality opinions than the central idea that public libraries have broad discretion
 15 to shape their collection and their reasonable decisions are not subject to
 16 heightened scrutiny. As the *Bradburn* court observed, "the crux of the issue is
 17 NCRL's discretion regarding what will be added to its collection." *Bradburn*,

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 26 ⁵ Like the plurality, Justice Breyer observed pragmatically that although filtering software is imperfect,
 27 "no one has presented any clearly superior or better fitting alternatives." 539 U.S. at 219.

28 DEFENDANT NCRL'S MEMORANDUM
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1 168 Wn.2d at 810. As to that issue, there simply is no imperative that a public
 2 library provide adult patrons access to all constitutionally-protected content
 3 available on the internet. Under *ALA*, libraries may appropriately use internet
 4 filtering for collection development if mechanisms exist for patrons to obtain
 5 access to material inadvertently blocked. The *Bradburn* court applied this
 6 essential principle from *ALA* and this Court should do the same.
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9 **III. Unpublished Authorities**

10 Pursuant to LR 7.1(g)(3), NCRL attaches copies of *Ass'n. of Christian*
 11 *Schools v. Stearns*, 2010 Lexis 745 (9th Cir. 2010) and *Institute for Creation for*
 12 *Research v. Texas Higher Educ.*, 2010 Lexis 60699 (W.D. Tex. 2010).
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15 **IV. Conclusion**

16 For these reasons, and for the reasons set forth in its earlier summary
 17 judgment submissions, NCRL asks this Court to enter summary judgment in its
 18 favor on Plaintiffs' claims under article I, section 5 of the Washington State
 19 Constitution and the First Amendment to the U.S. Constitution.
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 28 DEFENDANT NCRL'S MEMORANDUM
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2 DATED this 2nd day of July, 2010
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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the persons listed below:

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